GREAT FALLS POWER CO. *v.* GREAT FALLS & O. D. R. CO.

Sept. 14, 1905.

[52 S. E. 172.]

1. Eminent Domain—Extent of Power—Statutes—Construction.—Before the land of a corporation possessing the power of eminent domain can be taken under the right of eminent domain by another corporation under Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52, which provides that no corporation shall take by condemnation property belonging to another corporation possessing the power of eminent domain, unless the State Corporation Commission shall certify that a public necessity or public convenience shall so require and shall give its permission thereto, and in no event shall one corporation condemn any property owned by and essential to the purposes of another corporation possessing the power of eminent domain, it must be made to appear that public necessity or an essential public convenience requires that the land shall be taken and that the land is not essential to the purposes of the corporation owning it.

2. Same.—Since, prior to Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52, authorizing one corporation to condemn the land of another corporation possessing the power of eminent domain, it could not be done, the right conferred by the statute should not be extended beyond the explicit requirements thereof.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 107.]

3. Same—Public Use—Taking of Land by a Railroad for a Park.—A taking of land belonging to a corporation possessing the power of eminent domain by a railway company for a park at its terminal, attractive to pleasure seekers because of its scenic features, is not taking of land for a public use within Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 60.]

Appeal from State Corporation Commission.

Application by the Great Falls & Old Dominion Railroad Company for leave to acquire by condemnation proceedings lands owned by the Great Falls Power Company. From an order granting the application, defendant appeals. Reversed.

William H. White, for appellant.

R. Walton Moore and *D. S. Mackall,* for appellee.

HARRISON, J. This is an appeal from an order of the State Corporation Commission, granting an application made by the

appellee railroad company to be allowed to acquire by condemnation proceedings certain lands owned by the appellant power company situated in the county of Fairfax.

The Great Falls Power Company was incorporated by an act of the General Assembly of Virginia approved March 3, 1894, as amended by an act approved March 5, 1894 (Acts 1893-94, pp. 669-782), for the purpose of acquiring, holding, improving, and using water power at the Great Falls in the Potomac river, and for constructing dams therein, canals, and other hydraulic and auxiliary steam works, and for the selling and leasing of water power and using the same for manufacturing, etc., generating, transmitting, selling, and leasing electricity, electric power, and light for railway and canal, as well as other purposes.

The appellant owns on the Virginia side of the Potomac river a tract of land containing between 700 and 800 acres, procured at a cost of $500,000, for the purposes contemplated by its incorporation and has expended a large sum in perfecting elaborate plans for contemplated improvements. This tract of land is shown by the appellee to be "as wild as the Rocky Mountains."

The Great Falls & Old Dominion Railroad Company was incorporated by an act of the General Assembly of Virginia, approved January 24, 1900, as amended by an act approved March 29, 1902 (Acts 1899-1900, p. 148; Acts 1901-02, p. 457), with power to locate, build, and operate a railroad, commencing at some point on the Potomac river, in Alexandria county, opposite the District of Columbia, and running thence by the most practicable route to a point on the Potomac river in Fairfax county or Loudoun county, Va. The record shows that this railroad line has been located from the Aqueduct Bridge, in Alexandria county, opposite the District of Columbia, to a point in Fairfax county on the Potomac river at the Great Falls, a distance of some 14 miles, and that the work of building an electric railway has been begun and prosecuted to the extent of reconstructing the Aqueduct Bridge and making roadbed, bridges, and culverts in Alexandria county at an outlay of about $300,000. Both of these companies, the appellant and the appellee, are given under their respective charters the power of eminent domain.

This proceeding was inaugurated, under section 52 of the act concerning corporations, to obtain from the State Corporation

Commission a certificate, in accordance with the provisions of that section, authorizing the appellee to condemn the following three several parcels of land belonging to the appellant, located in the county of Fairfax, at the Great Falls, on the Potomac river, namely: Parcel No. 1, containing .93 acres; No. 2, containing 7.68 acres; and No. 3, containing 9.4 acres: The point sought to be condemned is shown to be "very rough and rugged—rocky; about as wild a piece of property as there is anywhere in the state of Virginia."

Section 52 provides as follows: "No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain, unless after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and in no event shall one corporation take by condemnation proceedings any property owned by and essential to the purposes of another corporation possessing the power of eminent domain." Va. Code, 1904, p. 576, c. 46a, § 1105e, subd. 52.

It is clear from this statute that before the land of the appellant can be condemned by the appellee two facts must be made to appear: (1) That a public necessity, or that an essential public convenience, requires that the land shall be taken; and (2) that such land is not essential to the purposes of the appellant.

Prior to the present law, under which this proceeding was taken, the land of appellant could not have been condemned by the appellee, because it had no legislative permission to take the property of another corporation. Alexandria, etc., R. R. Co. *v.* A. & W. R. R. Co., 75 Va. 780, 40 Am. Rep. 743; R. F. & P. R. R. Co. *v.* Johnston, 103 Va. 456, 49 S. E. 496.

The right, therefore, of one corporation to condemn property already devoted to the public use by another, should not be extended by construction beyond the explicit requirements of the statute giving that power.

The evidence tends very strongly to show that the land sought to be condemned is essential to the appellant for the development of its water power and that, if taken, the power company would be compelled to change its plans entirely; that there is a physical conflict between the use contemplated by the appellee and that

designed by the appellant. It is not necessary, however, in the view we take of the case, to pass upon or to consider this question.

Its legislative grant of power authorized the appellee to establish a railroad from some point on the Potomac river in Alexandria county to some point on that river in either the county of Fairfax or the county of Loudoun. It would meet the requirements of the charter for the terminal of the road to be located at any point on the river within the limits of the counties mentioned. The appellee owns land on the river above and adjoining that owned by the appellant. Above and adjoining the land of appellant it owns a tract of 30 acres, which appears to have been bought with a view to the use now sought to be made by condemnation of the land of appellant. The property in question, however, covers a commanding view of the Great Falls of the Potomac river, which is shown to be one of the grandest pieces of natural scenery in this country, second only in beauty and attractiveness to the Falls of Niagara.

It clearly appears that this land is sought by appellee as a terminal point on account of the rare scenic features it affords, and because of the attractions it would hold out to pleasure seekers from the city of Washington. In other respects the location possesses none of the advantages ordinarily accruing to a railroad, and but for the beauty of the scene would most likely have been avoided as offering no inducements to such an enterprise. It is further clear from the record that the quantity of land sought to be condemned is far beyond any necessity for mere terminal purposes of an electric railway extending a distance of 14 miles from the city of Washington. It is manifest from the evidence that the location was selected with no reference to the public use of the road in the matter of freight or the accommodation of the traveling public along the route, but that the real purpose of the condemnation is to establish a park overlooking the Great Falls of the Potomac, for the comfort and pleasure of sight-seers and curiosity seekers, and to thereby add to the revenues of appellee by making the point an attractive place of resort.

To justify the Corporation Commission in taking the action here complained of, it must not only appear that the land sought to be condemned is for public use, but it must affirmatively appear

that a public necessity or an essential public convenience requires that the land of the appellant shall be taken.

What is a public use is said to be incapable of exact definition; that it is easier to define by negation than by affirmation. Whatever rule may be formulated on the subject as a result of the adjudged cases, it cannot, we think, include the condemnation here sought as one made for a public use. Looking to the charter of the appellee, we find that the company was organized for "public use" in transporting persons and property along its line; in other words, has undertaken an ordinary railroad enterprise. The ground upon which private property may be taken for railroad uses without the consent of the owner is primarily that railroads are highways furnishing means of communication between different points and promoting traffic and commerce. The taking of property for these purposes must always be limited to the lawful necessities of the enterprise. The moment the appropriation goes beyond such necessity, it ceases to be justified on the principles which underlie the right of eminent domain. Cooley's Const. Lim. pp. 779, 780.

The charter of appellee furnishes no warrant for condemning property for the purpose indicated by the record. It is doubtless an attractive point, on account of its inspiring scenery, for the location of a park, and such a terminal would very probably increase the revenues of appellee; but to gratify the senses of the pleasure seeker and thereby incidentally to increase revenues is without the domain of a public use for which private property may be taken under the power of eminent domain.

In a well-considered case in New York, where the railroad company was given power to condemn private property for public use, it applied for the condemnation of a part of the land belonging to De Veaux College, which commands a view of the "Whirlpool Rapids." Its purpose was to give visitors a view of those rapids. It was held that this was not a public use for which private property could be taken, the court saying in part: "The fact that the road of petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limi-

tations, to make the enterprise a public one, so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls." In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429.

This case is very much in point, and the authorities there cited and the reasons given apply with equal force to the case at bar; for it is clear from the record that the part of the railroad running through the land of the appellant is not intended for ordinary traffic, but only for sight-seers.

We have seen that the use here sought to be made of appellant's property is not a public use in the sense that it can be taken under the power of eminent domain. The case at bar is, however, very much stronger than the Niagara Falls Case, because, granting that the use sought to be made by appellee of the land in question came within the meaning of a "public use" justifying condemnation, still the land could not be taken; for, the appellant being a corporation with the power of eminent domain, its land could not be condemned by another corporation possessing that power, unless the public use sought to be made of it reached the measure of a public necessity or an essential public convenience. This is the express mandate of the recent statute under which this proceeding is had, and without which the application of appellee could not be entertained.

Scenic advantages were held in the Niagara Falls Case not to reach the measure of a public use justifying condemnation proceedings; a fortiori must such advantages fail for insufficiency when subjected to the test of the public necessity contemplated by our law. Spending a pleasant day in the midst of wild and rugged surroundings on the banks of the Potomac, viewing its "Great Falls" while strolling in a beautiful park, would doubtless be both inspiring and invigorating to those who had the time and opportunity to enjoy it. That sight-seers should be furnished such an opportunity may be desirable, but it cannot be said to be a public necessity, demanding the displacement of appellant from

its private ownership by the compulsory proceedings here invoked.

For these reasons we are of opinion that the State Corporation Commission erred in awarding appellee the certificate complained of, and therefore its action must be reversed, the order appealed from set aside, and the cause remanded to the State Corporation Commission for such further proceedings in the premises as the appellee may be advised to take, with a view to condemning land for its uses through the lands of the appellant, not in conflict with the views expressed in this opinion.

Note.—This is a very important opinion and far-reaching in its consequences, and is remarkable as being the first case in which the Corporation Commission has been reversed. One point that came before the court is worthy of notice. Sec. 1105e, (52), Va. Code 1904, provides that no corporation shall take by condemnation proceedings property belonging to another corporation, possessing the power of eminent domain, unless the State Corporation Commission shall certify that a public necessity or that an essential public convenience requires that the land shall be taken. The court, after examining the record of the case before the Corporation Commission, overruled the same on the ground (among others) that the use sought to be made of the appellant's property did not reach the measure of a public necessity or an essential public convenience.

In the recent case of the City of Richmond *v.* County of Henrico, et als. decided in the Circuit Court of Henrico, Dec. 18, 1905, and reported in the January number of the Virginia Law Register (11 Va. Law Reg. 752), a similar question was before the court. There it was contended that the act (Sec. 1014a, Va. Code 1904) under which the court proceeded was unconstitutional, because it delegated legislative power to the judiciary in leaving to the court to determine the expediency and necessity of the annexation desired. In the latter case the statute required that the municipal council should first pass upon the necessity for or the expediency of annexation, and set forth the same in the form of an ordinance, and then allowed the court to pass upon the findings of the municipal council. The defendants demurred to the proceedings on the ground that this was a delegation of legislative power to the judiciary, but the court, after an examination of many authorities, concluded that the objection could not be sustained.

In the principal case, the statutory provision is for the Corporation Commission after hearing all parties, to certify "that a public necessity or that an essential public convenience" requires the condemnation of the land in question. This was a function formerly left to the Legislature; but, by the opinion of the Supreme Court in the principal case, it is seen that the question is one over which that court will exercise a supervisory power in reference to the findings of the Corporation Commission. There seems to have been no objection in the principal case that the Supreme Court in the examination of such a question was exercising power which was in violation of the maxim **delegata potestas non potest delegari,** and it would seem that the two

questions are identical, and that the conclusions of the Circuit Court of Henrico County are sustained by the opinion of the principal case.

Subsequent to the decision in the principal case, there was a petition for rehearing. In the petition, a copy of which has come into our hands since writing the above, the following propositions were contended for:

"I. Under the general law land held by a corporation, not in use or essential to the exercise of its franchise, can be condemned.

"II. The condemning company must be a public use corporation, i. e., a public service corporation. The presumption is that any company authorized by the legislature to acquire property by condemnation is of this nature. The presumption is conclusive in case of a company whose railroad is to be open to the public and subject to control as a common carrier of passengers and freight.

"III. The existence of a scenic or health or recreation feature, associated with other features, does not affect the nature of the company, so as to make it the less a public use or public service corporation. It is imperative that the enterprise should be regarded and treated as a whole. It is not permissible to single out particular features.

"IV. The statute (section 52 of the Act Concerning Corporations) in this instance does not apply except to transfer to the State Corporation Commission the decision of two questions, namely, (a) whether the railroad is a public use (as to which there can be no doubt), and (b) whether the land sought to be taken is essential to the purposes of the Power Company. The question of public necessity or convenience was in this instance determined by the General Assembly in granting its charter to the Railroad Company prior to the enactment of section 52; and, in view of section 62, there can be no pretext for the proposition that the General Assembly meant by that enactment to reopen the question and thereby divest a right or privilege already conferred and interfere with or destroy a work of internal improvement already begun.

"V. If, however, the State Corporation Commission is charged with the duty of deciding any, except the two questions, mentioned in the next preceding paragraph, it is the question as to whether the land sought to be taken or any part of it is necessary or convenient to the purpose of the Railroad Company. This question of necessity or convenience is wholly apart from the question of the public character of the condemning corporation and is largely within the discretion of the condemning corporation.

"VI. The question of necessity or convenience is not a new question, but is an old question and to be determined according to old and well-established principles and standards.

"VII. The question of necessity is a question of fact, and the admission of the Great Falls Power Company as disclosed by its agreement with the Railroad Company and otherwise, that the acquisition of the land is necessary to the execution of the common carrier's plans, should weigh heavily in its determination. The same is true in regard to the propriety of the location as the basis for such plans.

"VIII. The land sought to be taken, for the most part, is not only incapable of any use whatever by the Power Company, but it is far

beyond the needs, if not far beyond the right, of the Power Company to hold. The crossing by the Railroad Company of the possible canal of the Power Company, which is the only conflict suggested, is a matter that is not controlled by section 52."

To sustain proposition V, counsel for the railroad cited 15 Cyc. 636; Zircle *v.* Southern R., 102 Va. 17; N. Y. Co. *v.* Kips, 46 N. Y. 546-553; Cleveland & P. R. Co. *v.* Speer, 56 Penn. St. 33; Walker *v.* R. R. Co., 8 Ohio, 39; Fall River Co. *v.* Old Colony Co., 5 Allen (Mass.), 225; McKenna *v.* St. Louis Co., 69 Ark. 104; Stark *v.* Sioux City, 43 Iowa, 501; Lewis Em. Dom., Sec. 238; Sec. 162. The court, however, did not take the view contended for in proposition V, that the question of necessity or convenience was largely within the discretion of the condemning corporation (being a legislative question), but held on the contrary that the purposes for which the condemnation proceedings had been instituted did not reach the measure of a public necessity or convenience.

C. B. G.